No. 88-189

In the Supreme Court of the United States

OCTOBER TERM, 1988

BELL ATLANTIC, PETITIONER

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TABLE OF AUTHORITIES

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This case involves interpretation of the decree in the government's antitrust case against American Telephone and Telegraph Company (AT&T). The district court held that the nondiscrimination provisions of that decree prohibit the divested Bell Operating Companies (BOCs) from charging customers more for access to their local telephone exchanges if they use AT&T's switching services than if they use competing BOC services. The district court entered an order requiring U S West to cease such discrimination. Petitioner requested a declaratory ruling from the Federal Communications Commission (FCC) that its regulations permit equalization of access charges for certain competing switching services. The FCC issued a declaratory ruling in which it tentatively concluded that its regulations not only permit but also require that the

access charges for those competing services be equalized, although the Commission stated that it intends to revisit the issue in the context of a broader rulemaking. Petitioner contends that the existence of the FCC's declaratory ruling required the court of appeals to vacate as moot the district court's order enforcing the antitrust decree.

1. a. The Modification of Final Judgment (MFJ) in the AT&T antitrust case required respondent AT&T to divest itself of the BOCs, which were thereafter to provide local telephone exchange services and exchange access. *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 226-228 (D.D.C. 1982), aff'd mem. *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).[1] Pursuant to the MFJ, AT&T transferred the BOCs to seven regional holding companies, including U S West and petitioner Bell Atlantic. Part II.B.3 of the MFJ prohibits any BOC from discriminating between AT&T and "other persons" in the "interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service" (552 F. Supp. at 227), and Appendix B, Section B.1, requires each BOC to establish "unbundled tariffs" for exchange access that "shall not discriminate against any carrier or other customer" (*id.* at 233).

The General Services Administration (GSA) operates the Federal Telecommunications System (FTS), a private telephone network for the government's civilian agencies. Many calls on the network are from one network telephone to another (on-net calls), but others are placed to nonnetwork telephones (off-net calls). Off-net calls must be switched into the public exchange network before reaching their final destination. In some places GSA has

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[1] The MFJ defined "exchange access" as "the provision of exchange services for the purpose of originating or terminating interexchange telecommunications" (552 F. Supp. at 228).

purchased that switching service from the local exchange carriers, such as U S West, which perform the service with an ETS (Electronic Tandem Switch) in conjunction with their local Centrex switching service. In other places GSA has secured the service from AT&T, an interexchange carrier, which uses a CCSA (Common Control Switching Arrangement) to switch calls into the local exchange.

Under FCC regulations, the BOCs impose an "access charge" for connecting interexchange calls to the local exchange. See 47 C.F.R. Pt. 69 (1987). In bidding against AT&T to provide off-net switching services to GSA in local exchange areas served by U S West, U S West took the position that, if AT&T provided the switching service, U S West would charge the usage-based "carrier's carrier" access charge established by 47 C.F.R. 69.5(b) (1987) and charge AT&T separately for so-called "Dial 8" lines (lines connecting the local FTS telephones to the interexchange system). On the other hand, U S West maintained, if it provided the switching service itself, it would charge GSA only the business line rate plus the flat per-line "special access" surcharge established by 47 C.F.R. 69.5(c) (1987), and U S West would include the cost of the Dial 8 lines as part of a single charge to GSA for its Centrex service (1 C.A. App. A38-A42, A194, A196-A197).

AT&T filed an "Emergency Motion to Compel U S West to Comply With Nondiscrimination Provisions of Decree," alleging that "U S West is offering to provide essential local access facilities at dramatically lower rates *only if* [GSA] obtains those switching services from U S West, rather than from AT&T or other interexchange carriers" (1 C.A. App. A32-A33). The government filed a memorandum supporting AT&T's contention that U S West violated the decree by imposing higher access charges if GSA used AT&T switching services than if it used competing BOC services. Petitioner joined U S West in op-

posing the motion (1 C.A. App. A149-A243), arguing primarily that the MFJ does not prohibit discrimination against AT&T (1 C.A. App. A199-A202) and that the difference in charges is proper under the FCC access charge rules because GSA is an end user whereas AT&T is an interexchange carrier (1 C.A. App. A198-A199, A231-A232).

The district court granted AT&T's motion, ordering that U S West "(1) provide exchange access and other local exchange facilities for the Federal Telecommunications System (FTS) network and other private networks at the same rates, regardless of which carrier a customer selects to provide switching functions, and (2) publicly • • • announce the access and other local charges that will be the basis for any U S West responses to the General Services Administration's pending request for proposals" (Pet. App. 62a). In a short accompanying opinion, the court explained that "U S West's obligation under the decree not to discriminate in the pricing of exchange access and exchange service on the basis of a customer's choice of switching service is crystal clear," both from the language of the decree and from prior orders interpreting it (*id.* at 57a). The court rejected the argument that the MFJ permitted discrimination against AT&T (*id.* at 58a n.5), and it found no conflict between the MFJ as construed and federal or state regulatory requirements (*id.* at 58a-60a). U S West appealed.

b. After the district court's decision, petitioner filed a motion for clarification and a request for a stay with the district court, requesting a ruling on "whether or not the Court's Order • • • granting AT&T's motion for relief against U S West has application to [petitioner]" (1 C.A. App. A268). Petitioner indicated that, although it would impose usage-sensitive rates in its future bids to GSA, it generally construed its tariffs and FCC regulations "to permit off-net terminations on private networks at busi-

ness exchange rates * * * provided that special access charges are also levied and paid" (1 C.A. App. A274). The court denied the motion (Pet. App. 52a-54a), and petitioner appealed.

Simultaneously with the filing of its motion in the district court, petitioner filed with the FCC a petition for a declaratory ruling in which petitioner requested a determination that the FCC's regulations permitted petitioner to apply the same access charges for ETS services that it applied for CCSA services (3 C.A. App. A668). While the appeals from the district court orders were pending, the FCC released a declaratory ruling and a notice of proposed rulemaking. Pet. App. 37a-51a; *Amendment of Part 69 of the Commission's Rules Relating to Private Networks & Private Line Users of the Local Exchange*, 2 F.C.C. Rcd 7441 (1987). In response to petitioner's petition, the FCC held that "on the record before us * * * Centrex-ETS service described in the pleadings should be treated like CCSA service for purposes of the access charge rules" (Pet. App. 50a). It noted, however, that "we are today initiating a Rule Making [that] will specifically consider whether switched access charges should continue to apply to Centrex-ETS" (*id.* at 51a n.29). In its notice of proposed rulemaking, the Commission discussed the complicated competitive relationships among various categories of switching services and devices, noting that its disposition of petitioner's petition "resolved the immediate controversy" (para. 34), but only "tentatively" (para. 45). The Commission also requested comments on various alternative approaches to the problem. 2 F.C.C. Rcd at 7445-7451.

c. The appeals of petitioner and U S West were consolidated in the court of appeals. Citing the Commission's response to its petition, petitioner argued in its reply brief in the court of appeals that the district court's order en-

forcing the antitrust decree should be vacated because the case was moot. No other party in the court of appeals agreed with petitioner that the case was moot, and U S West (among others) vigorously disputed petitioner's mootness argument.

The court of appeals affirmed the district court's orders. The court of appeals agreed with the district court on the merits, holding that the language of the MFJ does not allow the BOCs to discriminate against AT&T (Pet. App. 10a-14a) and that U S West's rates constituted discrimination against a competitor (*id.* at 15a-18a). In addition, the court of appeals found it "clear that the trial court acted properly in denying [petitioner's] motion for clarification" (*id.* at 19a).

The court also rejected petitioner's mootness claim (Pet. App. 20a-24a). It reasoned that AT&T had a right to enforce the MFJ (*id.* at 20a). The court further ruled that the FCC's action granted no relief to AT&T, but, particularly in the context of the notice of proposed rulemaking, was merely a provisional ruling that petitioner could comply with the MFJ without violating any FCC rules while the agency considered the matter further (*id.* at 20a-23a). Moreover, the court of appeals observed that the FCC ruling did not resolve the issue regarding Dial 8 lines, which was also part of AT&T's motion (*id.* at 21a). Finally, the court noted, petitioner's contention seemed to be a primary jurisdiction argument "under the guise of a mootness claim," and the court pointed out that the primary jurisdiction argument in this case has repeatedly been rejected (*id.* at 23a). Judge Starr dissented on the ground that the case was moot (*id.* at 25a-36a).

2. The petition presents only the question of mootness, not a challenge to the merits of the order enforcing the antitrust decree. The court of appeals' ruling on the fact-bound mootness issue is correct and does not conflict

with the decision of any other court of appeals. Accordingly, the case does not warrant review.

a. A case is not moot if the parties retain a "legally cognizable interest in the outcome" (*Powell* v. *McCormack*, 395 U.S. 486, 496 (1969); see also *FDIC* v. *Mallen*, No. 87-82 (May 31, 1988), slip op. 6 n.7). The avowedly tentative response of the FCC to the petition filed by petitioner after petitioner lost in the district court does not deprive the parties to the MFJ of an interest in interpretation and enforcement of the MFJ.[2]

The FCC was concerned with determining which access charges should be applied, under its regulations, to particular switching arrangements. The issue before the district court was the interpretation of the MFJ, a decree entered in a suit brought under the Sherman Act (15 U.S.C. 1 *et seq.*).[3] The MFJ imposes obligations on the BOCs that are independent of the obligations imposed by the Communications Act of 1934 (47 U.S.C. (& Supp. III) 151 *et seq.*) and the regulations adopted under it; definition of the BOCs' obligations under one set of require-

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[2] If a controversy existed when a case was filed, the burden on the losing party to demonstrate mootness " 'is a heavy one.' " *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979) (quoting *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-633 (1953)).

[3] Thus, central to the position of U S West and petitioner on the merits was an argument that has no relevance in an FCC proceeding: that the language and history of the MFJ compel an interpretation allowing a BOC to discriminate against AT&T. That issue has been raised, at least implicitly, with respect to other MFJ interpretation questions (see Pet. App. 12a-13a), and its definitive resolution will be of continuing significance. Because the MFJ was entered to protect the public interest in competition, there is a public interest in removing any doubts about the obligations of the BOCs. That public interest counsels against holding this case to be moot. See *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 674-675 (1944).

ments does not obviate the need to define their obligations under the other.

As the court of appeals recognized (Pet. App. 23a-24a), petitioner's mootness claim amounts to an attack on the authority of district courts to enforce antitrust decrees with respect to conduct that is also subject to regulatory jurisdiction.[4] The MFJ was affirmed by this Court and has been in effect for more than five years. It is too late to argue that it may not be enforced because conduct that violates it may also violate FCC regulations.[5]

b. Petitioner's contention that the FCC ruling obviated any need for the district court's order is wrong for at least three reasons, even assuming that the FCC's order finally resolves the issues with which it deals. First, the scope of the district court's order exceeds the scope of the FCC's ruling in certain significant respects.[6] The district

[4] The district court and the agency in this case reached consistent results with respect to the conduct in issue. This case, therefore, does not raise the question of reconciling conflicts between regulation and antitrust decrees.

[5] Contrary to petitioner's contention (Pet. 15-17), the Fifth Circuit has not adopted a rule broadly precluding district courts from enforcing existing antitrust decrees if an agency declares that the offending conduct also violates other prohibitions. In *Western Elec. Co.* v. *Milgo Electronic Corp.*, 568 F.2d 1203 (5th Cir.), cert. denied, 439 U.S. 895 (1978), on which petitioner relies, there was no underlying injunction already in effect. Nor did the agency designate its action as "tentative." And the agency's order encompassed the relief afforded by the district court, unlike the agency order in this case (see pp. 9-10, *infra*).

[6] In other respects, of course, the scope of the issues with which the agency deals is much broader than the scope of the issue presented by the MFJ's prohibition on discrimination, which focuses solely on conduct that disadvantages a competitor and thereby threatens to impair competition. The MFJ does not govern the level of rates, so long as there is no discrimination; nor does it govern disparities in the rates paid by parties not in competition with each other.

court's order applies to any type of discrimination U S West might use to gain an anticompetitive advantage for its switching services over those of its competitors, whereas the FCC's decision relates only to the access charges to be used in connection with Centrex-ETS and CCSA services. The district court's order also covers access to the local exchange for intrastate telecommunications that are outside the jurisdiction of the FCC (see 47 U.S.C. (& Supp. III) 152(b)(1)). And, as the court of appeals determined (Pet. App. 16a-18a, 21a), the district court order covers discrimination with respect to charges for Dial 8 lines.[7]

Second, the FCC's order is merely declaratory in nature; a violation could only be remedied through separate enforcement proceedings. The district court, on the other hand, entered an injunction requiring U S West to comply. U S West is subject to contempt sanctions if it disobeys that order. Thus, the FCC has not afforded AT&T the relief it sought and obtained in the district court.[8] Petitioner has cited no case in which a mere declaratory ruling

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[7] Petitioner contends that the court of appeals erred in finding that the district court decided the Dial 8 issue (Pet. 5 n.2, 14-15 n.8). The district court did not refer to the Dial 8 lines specifically in its opinion, but the order is broad and inclusive: U S West must provide all "exchange access and other local exchange facilities * * * at the same rates" and publicly announce all "access and other local charges" that will be the basis for its response to GSA's requests for proposals (Pet. App. 62a). Indeed, U S West's briefs in the court of appeals indicated its understanding that the order applied to Dial 8 lines as well as access charges. In any event, the correctness of the court of appeals' interpretation of the district court's order is not an important issue of law warranting review by this Court.

[8] The MFJ was entered in an antitrust suit in which the government charged, among other things, that the Bell System had discriminated against its competitors in affording access to the local exchange monopoly, despite the prohibitions of the Communications Act. The MFJ prohibited the discrimination involved here, in terms that the

by an administrative agency has been held to moot a case in which one party had obtained an injunction against the other.

Finally, the district court determined that U S West's rates violated an existing injunction, the MFJ. No sanctions have yet been imposed, but that possibility remains open. The Department of Justice is continuing to investigate U S West's provision of switching services to GSA, and it will seek judicial enforcement action if it concludes that sanctions or further remedial orders are appropriate. In these circumstances, the case plainly is not moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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district court found "crystal clear" (Pet. App. 57a). In these circumstances, an FCC ruling that does no more than declare the law cannot alone satisfy petitioner's heavy burden of establishing that "there is no reasonable expectation that the wrong will be repeated." *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

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